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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☒ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**Objection of USACM Trust to Proof of
Claim of Kyong Austin as Filed in
Wrong Debtor's Case and Not Timely
Filed (with Certificate of Service)**

Date of Hearing: April 10, 2009

Time of Hearing: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

1 order disallowing Proof of Claim No. 10725-02576 filed by Kyong Austin (“Austin”) in
 2 the amount of \$61,293.43, as filed in the wrong debtor case and untimely filed.

3 **I. JURISDICTION**

4 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
 5 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
 6 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

7 The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and
 8 Bankruptcy Rule 3007.

9 **II. BACKGROUND**

10 1. On April 13, 2006 (“Petition Date”), USACM, USA Securities, LLC (“USA
 11 Securities”), USA Capital Realty Advisors, LLC (“USA Realty”), USA Capital
 12 Diversified Trust Deed Fund, LLC (“DTDF”), USA Capital First Trust Deed Fund, LLC
 13 (“FTDF,” together with DTDF, the “Funds”) (collectively, the “Debtors”), filed voluntary
 14 petitions for relief under chapter 11 of the Bankruptcy Code. Debtors continued to operate
 15 their businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and 1108 of
 16 the Bankruptcy Code. Debtors’ post-petition management of the Debtors was under the
 17 direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC
 18 (“Mesirow”), who served as the Chief Restructuring Officer.

19 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
 20 business of underwriting, originating, brokering, funding and servicing commercial loans
 21 primarily secured by real estate, both on behalf of investors and for its own account.

22 3. On September 14, 2006, the Court entered its Order Setting Deadline to File
 23 Proofs of Claim and Proofs of Interest (the “Bar Date Order”) [Docket No. 1280]. The
 24 Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as
 25 the deadline (“Bar Date”) for creditors to file proof of claims.
 26

4. On September 25, 2006, the Debtors served a copy of the Bar Date Order on their service lists [Docket No. 1358]. All Direct Lenders were served with a copy of the Bar Date order as well [Docket No. 1358].

5. On November 6, 2006, a stipulation was filed and an order entered extending the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket No. 1729].

6. On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third Amended Joint Chapter 11 Plan of Reorganization" [Docket No. 2376].

7. Debtors' Third Amended Chapter 11 Plan of Reorganization (the "Plan") [Docket No. 1799] provides the following deadlines for objections to Claims:

a. for any and all Claims and Equity Interests to which the General Bar Date applies, ninety (90) days after the Effective Date; (B) for any and all Claims to which the Administrative Claims Bar Date or the Professionals Administrative Bar Date applies, thirty (30) days after the expiration of the respective Bar Date; and (C) for any and all Claims to which the Bar Date applicable under section B.3 of Art. V of the Plan applies, thirty (30) days after the expiration of that Bar Date.

8. USACM's claims and noticing agent received approximately 2,436 proofs of claim as of the January 13, 2007 Bar Date, asserting claims totaling more than \$997,000,000, plus unknown amounts based on unliquidated Claims.

9. Under the Plan, the USACM Trust is the successor to USACM with respect to standing to seek allowance and disallowance of Claims.

10. The USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007. Geoffrey L. Berman is the Trustee.

III. APPLICABLE AUTHORITY

11. Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the

1 proof of claim, the Court, after notice and hearing, shall determine the amount of the
2 Claim and shall allow the Claim except to the extent that the Claim is “unenforceable
3 against the debtor . . . under any . . . applicable law for a reason other than because such
4 claim is contingent or unmatured.” 11 U.S.C. § 502(b).

5 12. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.
6 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such
7 objections has been extended to June 10, 2009, by this Court’s orders.

8 13. A properly filed proof of claim is presumed valid under Bankruptcy Rule
9 3001(f). However, once an objection to the proof of claim controverts the presumption,
10 the creditor ultimately bears the burden of persuasion as to the validity and amount of the
11 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,
12 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996). The ultimate
13 burden of proof as to the validity of a proof of claim “remains at all times upon the
14 claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035,
15 1039 (9th Cir. 2000).

16 **IV. OBJECTION TO CLAIM**

17 1. USACM Trust objects to this claim because the basis for the claim is an
18 investment in USA Capital First Trust Deed Fund (“FTDF”). Any claim held by Austin
19 against USACM solely on account of the investment in FTDF is derivative of FTDF’s
20 claims against USACM. Under a settlement approved by the Court on June 12, 2007, all
21 such claims were settled, with FTDF holding a \$7.0 million allowed general unsecured
22 claim and beneficial interest in the USACM Liquidating Trust. The equity interest holders
23 in FTDF will share in any recovery on account of that claim.

24 2. USACM Trust objects to the proof of claim because it was untimely filed.
25 On September 14, 2006, the Court entered its Order Setting Deadline to File Proofs of
26



Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as the deadline (“Bar Date”) for creditors to file proof of claims. The deadline for Direct Lenders to file Proofs of Claim was January 13, 2007 [DE 1729]. The Austin proof of claim was filed on November 15, 2007, long after the deadline to file a proof of claim or proof of interest and was filed after the FTDF case was closed. The Austin proof of claim 10725-2576 amends a previously filed claim # 10728-00150 (claim 28-150) dated September 24, 2007. Claim 28-150 was filed in USA Capital First Trust Deed Fund case, however it was not timely filed in that case either. The USA Capital First Trust Deed Fund case was closed on October 12, 2007.

V. CONCLUSION

The Court should disallow the Austin claim because: (1) the claim is based upon an investment in FTDF that is derivative of FTDF’s claims against USACM, and equity interest holders in FTDF will share in any recovery on account of that claim; and (2) the claim was not timely filed.

The USACM Trust respectfully requests that the Court disallow the Austin claim in its entirety. The USACM Trust also requests such other and further relief as is just and proper.

DATED: March 3, 2009.

LEWIS AND ROCA LLP

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LEWIS
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LAWYERS

PROOF OF SERVICE

Copy of the foregoing mailed by First
Class, U.S. Mail, postage prepaid, on
March 3, 2009 to the following parties:

Kyong Austin
5155 W. Tropicana, # 2117
Las Vegas, NV 89103

/s/ Carrie Lawrence
Carrie Lawrence